# United States
# Court of Appeals
## For the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, et al.,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## Brief for Petitioners

Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

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Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

### Jurisdiction

This is a petition by A. M. Andrews Company of Oregon, hereinafter referred to as "Andrews Oregon", and A. M. Andrews of Illinois, Inc., hereinafter referred to as "Andrews Illinois", and referred to herein as "petitioners", to this Court for an order that additional evidence be taken before the National Labor Relations Board, herein referred to as "the Board", its members, agent or agency and be made

part of the transcript in the proceedings entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., and International Association of Machinists, A.F.L., Case No. 14-CA-1208, 112 N. L. R. B. No. 89" or for review of the Decision and Order in said case and for an order of this Court that the same be set aside.

This Court has jurisdiction of the subject matter of this proceeding by virtue of Section 10(e) and (f) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. §141, et seq.

## STATEMENT OF THE CASE

### The Facts

A. M. Andrews Company of Oregon is an Oregon corporation with its principal place of business in Portland, Oregon. Its stock is owned as follows: A. M. Andrews 345 shares, Alex Marshall 16 shares, Norman Brown 1 share and Ray H. Lesher, 1 share. Its officers are as follows: Andrews, president; Marshall, vice president; Brown, treasurer, and Lesher, secretary. Mr. Lesher resigned as secretary on July 26, 1954, and was succeeded by Mr. Brown.

Andrews Oregon began to manufacture plastic hose sprinklers in 1951. It is still in that business.

A. M. Andrews of Illinois, Inc., is an Illinois corporation with its principal place of business in Carterville, Illinois. Its stock is owned as follows: A. M. Andrews 1 share, John A. Tuttle 1 share, Nor-

man Brown 1 share and Ray H. Lesher 1 share. Its officers are: A. M. Andrews, president; Tuttle, vice president; Brown, treasurer, and Lesher, secretary (R. 3).

Andrews Illinois was organized on February 27, 1954. It began to manufacture plastic hose sprinklers on April 27. Between May 11th and May 26th it was shut down for lack of orders. On June 1 it shut down and except for a few days' work for a few employees in July it has not operated since either there or elsewhere.

Separate bookkeepers were employed. Separate books for each company were maintained (R. 4).

Andrews Illinois entered Carterville, Illinois, as the result of negotiations between Mr. A. M. Andrews and Godfrey Hughes of Southern Illinois, Inc., which organization is interested in the industrial development of Southern Illinois. There were also negotiations with a group of Carterville businessmen including Lee Hooker, Mack Steffes, Paul Dorcy and Wes Hayton. These men erected the plant which Andrews Illinois occupied and contracted to purchase (R. 5).

Two men from Portland came to Carterville to help set up the plant and train the personnel (R. 3) and stayed on as plant manager and production foreman (R. 4).

The plant operated from April 27 to May 11, when it shut down for lack of orders. It again began production on May 26 and operated until June 1.

The Union began an organizing campaign during the lay-off and sent a letter to Andrews Illinois requesting recognition and a meeting for negotiation. This letter was received on June 1.

Mr. Tuttle, the manager of Andrews Illinois, telephoned Mr. Andrews in Portland, who directed that the plant be closed. About 2 p.m. a committee of Carterville businessmen consisting of Hughes, Hooker, Steffes, Hayton and Heckle came to the plant, called a meeting of the employees during working hours, addressed them on the subject of the Union and its request to bargain. Two ballots of the workers were taken.

The plant was closed at the end of the work day and has remained closed ever since, except a few days' work to fill out a government order.

As a result of the activity on June 1, a proceeding under Section 10(b) of the National Labor Relations Act as amended was brought. The complaint was issued on June 28 and amended on August 27 and the hearing was held on September 20.

The Intermediate Report and Recommended Order of the Trial Examiner was entered on October 28, 1954. The Trial Examiner found that Andrews Illinois was guilty of certain unfair labor practices and that it was responsible for the acts and statements of the Carterville businessmen.

The Trial Examiner found that Andrews Oregon did not engage in the unfair labor practices of An-

drews Illniois and could not be held responsible for them.

The Decision and Order of the Board which was rendered May 10, 1955, affirmed the findings of the Trial Examiner except that it held that Andrews Oregon was responsible for the unfair labor practices of Andrews Illinois.

### The Issues

The issues before this Court are two in number:

(1) Whether the Board erred in finding that Andrews Oregon was responsible for the unfair labor practices of Andrews Illinois and that the employees of the said Andrews Illinois be paid by Andrews Oregon because there is no evidence in the record as a whole to support such finding.

If the Court finds that the Board erred, then the Court does not have to answer the second issue, which is:

(2) Whether the Board should be ordered to take additional evidence as to the economic causes of the shut-down of Andrews Illinois, the date of such shut-down and the relationship between Andrews Oregon and Andrews Illinois.

The question before this Court is not whether there was an unfair labor practice. That is conceded. The question is whether there was evidence in the record as a whole to support the Decision and Order of the Board that Andrews Oregon should be held responsible for the unfair labor practice.

The Trial Examiner in his Intermediate Report and Recommended Order held that Andrews Oregon did not commit the unfair labor practice and could not be held responsible for the unfair labor practices of Andrews Illinois. That portion of his report dealing with the responsibility of Andrews Oregon is set forth in Appendix A to this brief.

On the responsibility of Andrews Oregon, the Board reversed the Trial Examiner and held Andrews Oregon responsible. That portion of the Decision and Order of the Board dealing with the responsibility of Andrews Oregon is set forth in Appendix B.

## I.

## THERE WAS NO EVIDENCE TO SUPPORT THE BOARD'S FINDING IN HOLDING ANDREWS OREGON RESPONSIBLE.

### Summary of Argument

(1) Andrews Oregon and Andrews Illinois were two separate and distinct corporations.

(2) Andrews Oregon did not commit nor have anything to do with Andrews Illinois' unfair labor practice.

(3) The seven factors of "paramount significance" have no basis either in law or in fact to support the Board's holding that Andrews Oregon be held liable to the employees of Andrews Illinois.

**Argument**

The Board, in reversing the Trial Examiner, is flying in the face of both common sense and established law. A reading of the appendices to this brief will establish that. The reason why the Board undertook to reverse the Trial Examiner is obvious. Andrews Illinois is defunct. After it closed down on June 1 it never again reopened. An order directing that the unfair labor practice be remedied and that the Andrews Illinois employees be given pay following the unfair labor practice would be meaningless. This being so, the Board decided to stick Andrews Oregon.

However, there is no evidence to support its finding that Andrews Oregon was an employer, within the meaning of the Act, of the employees of Andrews Illinois.

The very reason which motivated the Board to hold Andrews Oregon liable is ample evidence that it should not be held liable. Andrews Oregon is still in business—Andrews Illinois is defunct. An examination of the record will point out the differences between the two corporations.

Andrews Oregon was an Oregon corporation manufacturing plastic sprinkler hose in Portland, Oregon. It was founded in 1951. Mr. Andrews owned 345 shares (R. 3) or about 80 per cent (R. 65).

Andrews Illinois was an Illinois corporation organized in February, 1954. It manufactured plastic

hose sprinklers in Carterville, Illinois. Mr. Andrews owned only 25 per cent of the stock (R. 3). Each company had its own set of books and its own bookkeepers (R. 4). While the officers were substantially the same, there were differences.

There can be no doubt that there were two separate corporations—one an Oregon corporation—one an Illinois corporation. Likewise, there cannot be any doubt that, while three individuals owned stock in each company, Alex Marshall owned 16 shares of stock in Andrews Oregon and none in Andrews Illinois. John Tuttle owned none in Andrews Oregon and one-quarter of the stock of Andrews Illinois. As to the three stockholders common to each company, it has been pointed out that Mr. Andrews owned the vast majority of the stock of Andrews Oregon and that he owned but one-quarter of the Illinois corporation. The reverse is also true. Both Norman Brown and Ray H. Lesher owned one share of the Oregon company—a very small percentage—but each owned a quarter of the stock of Andrews Illinois.

The unfair labor practice of which Andrews Illinois was found guilty was based to a very large extent upon the holding that certain Carterville businessmen were the agents of the Illinois corporation when they appeared at the plant and attempted to influence the employees of Andrews Illinois against the Union. The creation of this agency relationship between Andrews Illinois on the one hand

and the Carterville businessmen on the other seems to stretch the common law concepts of agency pretty far, but to create the relationship of principal and agent between these Carterville merchants on the one hand and Andrews Oregon on the others is preposterous. There is no evidence that these men ever acted for or in behalf of the Oregon corporation. It is to be noted that the Trial Examiner found that Andrews Oregon "was not responsible for any of the unfair labor practices which were committed at Carterville" (R. 14).

The evidence and the finding of the Trial Examiner (R. 14, 114) clearly show that Andrews Oregon had nothing to do with unfair labor practice (b)—that is the polling and questioning of the Carterville employees concerning their union activities, sympathies, etc.

By the very same token, Andrews Oregon could have nothing to do with the lockout. There is no doubt that such a lockout was ordered, that such a lockout was an unfair labor practice, and that such a lockout was ordered by Mr. Andrews. There is a complete failure of evidence that A. M. Andrews Company of Oregon, the corporation, had anything to do with it (R. 14).

In *N. L. R. B. v. Bonita Fruit Co., Inc.,* 158 F. (2d) 758 (5th Cir., 1947), the Court passed upon a similar problem. The stock of Vahlsing, Inc., was owned by the same persons and in the same proportions as the stock of the Bonita Fruit Co., Inc. In this case

neither the directors nor the officers were the same. The unfair labor practice was committed by an agent of Vahlsing, Inc., and in ruling on the question as to whether Bonita should be held liable for such unfair practice the Court said on page 759:

> "* * * The Board declined to find that the organization of Bonita was a mere trick to evade the law. It was a substantial corporation lawfully organized with different and independent officers, plant and business, and with its own assets and liabilities. That it was owned by the same stockholders as Vahlsing, Inc., does not make them identical legal persons in labor law any more than in other law. Vahlsing, Inc., is not responsible for the discrimination in October, 1944; nor can it reinstate the 14 employees; or be called on to make them whole. The joint order is not enforciable against it."

The Board undertook to overrule the Trial Examiner on the question of the responsibility of Andrews Oregon (R. 51-52 and Appendix B of this brief). In support of its ruling, the Board has enumerated seven factors of "paramount significance" to which "the Trial Examiner did not avert" (R. 52).

They are as follows:

(1) "That both Respondents are engaged in manufacturing and selling the same product and have almost identical names."

That these factors are true is not in issue. What possible significance could they have? To ask this question is to answer it. Can A. M. Andrews Com-

pany of Oregon (an Oregon corporation) be held responsible for the acts of A. M. Andrews of Illinois, Inc. (an Illinois corporation), because of the similarity of name and product?

*Mount Hope Finishing Co. v. N. L. R. B.,* 211 F. (2d) 365 (4th Cir., 1954), is a case virtually identical on its facts and one whose logic and holding should control here. In that case, upon petition to review, the Court refused to enforce an order of the Board holding a North Carolina corporation responsible for certain acts of a Massachusetts corporation. There both corporations were in the business of finishing textiles. The North Carolina corporation was created as the Creedmore Company but its name was changed to Mount Hope Finishing Company, Inc.—a name identical with the Massachusetts corporation.

The similarity of names came before the Court in *N. L. R. B. v. Red Rock Co.,* 187 F (2d) 76 (5th Cir., 1951). One company was named Red Rock Cola Company. The other was the Red Rock Company. Both were Georgia corporations. That fact was given no weight in the opinion of the Court.

Nothing could be of less significance as to the true character and identity of a corporation than its formal corporate name. The lack of similarity of names in *Somerset Classics, Inc.,* 90 N. L. R. B. 1676, was given no weight there. It is inconceivable that the similarity of name should be given any weight here (cf. *N. L. R. B. v. Lunder Shoe Corp.,* 211 F. (2d)

284 (1 Cir., 1954), Lunder Shoe Corp., dba Bruce Shoe Co. and Bruce Shoe Co., Inc.).

The fact that Andrews Illinois and Andrews Oregon manufactured and sold the same product is likewise of no significance. In the Mount Hope case, both companies finished textiles. In the Bonita case, both companies handled citrus fruit.

(2) "That A. M. Andrews is the virtual owner of Respondent Oregon, and together with his nephew owns 50 per cent of the stock of Respondent Illinois."

Mr. Andrews owned approximately 80 per cent of the stock of Andrews Oregon but he owned only 25 per cent of Andrews Illinois. That his nephew, Mr. Tuttle, also owned 25 per cent of the Illinois company is of little evidentiary value. Even if Mr. Andrews and Mr. Tuttle could be counted as one, and there is no evidence of this except that Mr. Tuttle happens to be Mr. Andrews' nephew, they still do not control the Illinois corporation. It is to be noted that Tuttle, who owns one-quarter of the stock of the Illinois corporation, is not a stockholder of the Oregon corporation. It is also to be noted that Alex Marshall, who is the second largest stockholders of Andrews Oregon, owns no stock in Andrews Illinois.

In the Mount Hope case, Robert D. Milliken owned 60 per cent of the Massachusetts Mount Hope corporation and 100 per cent of the North Carolina Mount Hope corporation. In the Bonita Fruit case, the stock of Vahlsing, Inc., was owned by two people.

The same two people formed the Bonita Fruit Company and held stock in the same proportion. In *N. L. R. B. v. Shawnee Milling Co.*, 184 F. (2d) 57 (10 Cir., 1950), the Pauls Valley Company was a branch plant of the Shawnee Company. The Court held that such a fact was not controlling. The language which the Court used, while on a different facet of the problem of related companies, is of value here. On page 59 the Court said:

> "* * * To hold that under these conditions the common ownership of the two plants subjects Pauls Valley, a purely intrastate operation, to the jurisdiction of the Board would be to hold that one may not operate two businesses, wholly separate and apart—one engaged in interstate business and the other in intrastate operations—without subjecting both to the jurisdiction of the Board. We know of no case that has gone that far."

(3) "The officers in both corporations are virtually the same."

Mr. Andrews was the president and Mr. Brown the treasurer of each corporation. Mr. Marshall, the vice president of Andrews Oregon, held no position with Andrews Illinois. Mr. Tuttle was the vice president of Andrews Illinois but was not an officer of the Oregon corporation. He was also the general manager of the Carterville plant (R. 66). Up until July 26, 1954, Mr. Lesher was the secretary of each company. On that day he resigned as secretary of the Oregon company, but retained that position with

Andrews Illinois. While this change of management took place after the unfair labor practice, it is none the less indicative of the separateness of the two corporations.

Again, referring to the Mount Hope case, the officers of both corporations were identical but that fact was held to be of no consequence.

(See Appendix C.)

(4) "That the Respondent Oregon lent its credit to Respondent Illinois in the acquisition by the latter of raw materials and machinery—thereby providing the very means whereby the Respondent Illinois could operate."

(5) "That after the shut-down of the Carterville plant, the raw materials and physical assets of Respondent Illinois were turned over to Respondent Oregon, presumably to be disposed of as the latter might direct."

These two items may be treated together. There is no doubt that Andrews Oregon guaranteed that the suppliers of Andrews Illinois would be paid. The guaranteeing that the suppliers of a new corporation will be paid is a phenomena of business that occurs daily. Often the officers of a corporation go on the note of a corporation in their individual capacity. Countless times every day a promissory note has an accommodation endorser on it. None of these purely financial transactions would make the person primarily liable and the one guaranteeing the same with respect to their respective obligations to their employees.

In every commercial venture there are countless examples of the extension of credit—and the guaranteeing by Andrews Oregon was merely an extension of credit to Andrews Illinois. To do so is certainly not an act that would make the lender an employer under the Act.

In this case the Carterville businessmen—those same men who were held to be the agents of Andrews Illinois in the commission of the unfair labor practice—extended credit to the Illinois corporation. They built the Carterville plant and then entered into a contract to sell it to Andrews Illinois (R. 5). This extension of credit, like any bank loan, like the guaranteeing by Andrews Oregon, has no bearing on whether anyone other than Andrews Illinois should be responsible for the consequences of its unfair labor practices.

Just as the giving of credit by one corporation or individual to another is an ordinary everyday commercial happening, so is the taking of security for such a guarantee. After Andrews Illinois closed down its plant at Carterville, it was never reopened. Mr. Andrews attempted to explain the financial trouble of Andrews Illinois and in fact the Board found that the Illinois corporation closed its plant as the result of economic considerations (R. 54). What other course was left open to Andrews Oregon than to do exactly what it did? Certainly it could not leave the raw materials and machinery at the Carterville plant. They had to be removed and so

quite naturally they were taken to Portland so that Andrews Oregon could look to them for security for its guarantees.

In fact, the very manner in which this transaction was handled discloses that these were two separate and distinct companies. The Board finds that the "Raw materials used by the Carterville plant was (sic) carried on the books of Respondent Oregon corporation as an account receivable." It was handled like any other sale on credit—and when the purchaser could not pay, the goods were reclaimed.

In the Mount Hope case exactly the same financial transactions took place, except that the North Carolina company prospered. On page 372, the Court said:

> "In order to reach the conclusion that the business was removed from Massachusetts to North Carolina, it was necessary to hold, and the Board found, that the North Carolina corporation is the *alter ego* of the Massachusetts corporation. In support of this proposition the Board points out amongst other things that Robert D. Milliken owns 60% of the Massachusetts corporation and 100% of the North Carolina corporation; that the two companies have the same officers and the same name and *that 80% of the machinery worth $100,000 and supplies worth $750,000 were sent from Massachusetts to North Carolina and are carried on the books of the North Carolina corporation on open account as purchases yet unpaid for.* These, of course, are significant circumstances; but the fact remains that

the North Carolina business belongs in its entirety of Robert D. Milliken while Daylor owns 36% of the Massachusetts corporation for which he paid $400,000. According to the uncontradicted testimony he has no financial interest in the North Carolina corporation and expects it to fulfill its obligations. Under these circumstances we cannot say that the two corporations are one and the same enterprise. The Massachusetts corporation is now in process of liquidation and so far as can be foreseen, its active life is at an end. The North Carolina corporation is carrying on an active business enterprise. The only reasonable conclusion to be drawn from these facts is that the business of one corporation is at an end and that the business of the new and living corporation is separate and distinct. Aside, however, from this viewpoint it is manifest and we hold that the change from Massachusetts to North Carolina was made for economic reasons and not to avoid bargaining with the union." (emphasis added)

(6) "That the labor relations of both corporations were controlled by the same person, the aforementioned A. M. Andrews."

This finding by the Board is not supported by the record.

Mr. Andrews testified as follows (R. 66):

"Q. Who is your managing agent, who was at the time of the shut-down at the plant at Carterville, Illinois?

"A. John Tuttle.

"Q. To whom did Mr. Tuttle report?

"A. To the Board of Directors.

"Q. Who does he report directly to, does he report directly to you as President?

"A. Yes.

"Q. Who handles the labor relations problems, if any, at your Oregon establishment?

"A. We don't have any.

"Q. If you had any, who would handle them, Mr. Andrews, if you had any?

"A. Well, I don't know about something that we never had. We never had to hire anyone for that reason.

"Q. You do consider yourself as the man who would handle any labor relation problems at both establishments, do you not?

"A. Well, naturally, to go along with the policy I have followed."

How can the Board say that Mr. Andrews controls the labor problems of Andrews Oregon when he himself says that there have never been any and that he cannot say about something that has never happened?

There is no question that Mr. Andrews was the president of each corporation, but that fact certainly does not make Andrews Oregon liable for the unfair labor practices which Mr. Andrews may commit in

his capacity as the head of Andrews Illinois. As president of Andrews Oregon he is responsible to one group of stockholders and as president of Andrews Illinois he is responsible to a different group.

(7) "That A. M. Andrews demonstrated his practical control over Respondent Illinois by himself making the vital decision to shut down operations at Carterville."

Other than the fact that this statement is not supported by the record (R. 67), it has no weight at all in supporting the Board's conclusion to make Andrews Oregon responsible to pay the employees of Andrews Illinois. That Mr. Andrews ordered the shut-down is not in issue, nor is in issue the fact that such order was an unfair labor practice. That order was made, as we have said in the last point, by Mr. Andrews in his capacity as president of the Illinois corporation. There is nothing to tie such action up with Andrews Oregon.

The Board has laboriously recited seven separate points which it states the Trial Examiner overlooked (R. 52). The Board unfortunately overlooks the one point which must be necessary to hold these two corporations "a single employer within the meaning of the Act." There is no evidence which shows that the corporations are "interrelated or intertwined" or that Andrews Illinois is part of "a single enterprise".

The Board in *Don Juan Co., Inc., and Don Juan, Inc.*, 79 N. L. R. B. 154, 178 F. (2d) 625 (2 Cir., 1949),

held that the two companies were interrelated and intertwined and a single employer. There Don Juan Co. was manufacturing and selling cosmetics. This business Don Juan, Inc., used to do. The manufacturing was done in a building owned by Don Juan, Inc. Don Juan Co. was not only owned largely by the same two individuals who owned Don Juan, Inc., but also Don Juan, Inc., held stock in the Don Juan Co. The identity of these two corporations, the fact that one was an operating company and the other a holding company, their close physical proximity are a far cry from the fact situation as it applies to petitioners. Both of petitioners are independent. While there are stockholders in common, it cannot be compared to the Don Juan situation.

In the case now before the Court, one company operates in Portland and the other operated in Carterville.

In *Somerset Classics, Inc.,* 90 N. L. R. B. 1676, Modern was a clothes jobber which bought material and cut it. Other firms completed the garments and then sold the completed garments back to Modern, which then in turn sold them. Somerset was engaged exclusively in processing Modern's fabrics. The ownership of both Modern and Somerset was by the Friedman family. The labor relations were carried on by the same man and his decision "as an officer of Modern to cease using Somerset as a contractor made Modern the means for accomplishing the anti-union policies of Somerset." This case may be easily

distinguished from the one now before the Court. First, neither Andrews Illinois nor Andrews Oregon played any part in the manufacture of the other's finished product. Each company made its own sprinkler hose. Neither is part of a single enterprise. Second, the decision of Mr. A. M. Andrews to close down the plant of Andrews Illinois was made in his capacity as president of that company. It had no effect on Andrews Oregon or its employees who were completely separate, being some 2,000 miles away, and operating under different conditions and circumstances. Nor can it be argued with any logic or persuasion that Mr. Andrews' decision was made in his capacity as president of Andrews Oregon. Andrews Oregon, other than lending its credit, had nothing to do with Andrews Illinois. No anti-union policy of Andrews Oregon, even if it had one, could be furthered by that decision of Mr. Andrews acting as president of Andrews Oregon.

The decision had to be made in his capacity as president of Andrews Illinois and as such it had nothing to do with Andrews Oregon.

In *N. L. R. B. v. Federal Engineering Co.*, 153 F. (2d) 233 (6 Cir., 1946), the Court on page 234 found:

> "* * * the corporation and the co-partnership are engaged in a single enterprise conducted by the same four individuals. Their actions as partners and as owners, directors and officers of the corporation in controlling the labor policies of the co-partnership and committing the unfair labor practices found cannot be separated sen-

> sibly. The corporation *owns the plant and fixtures* and its affairs are so interrelated and intertwined with those of the co-partnership as to make it an essential party * * *" (emphasis added).

Andrews Oregon did not own the plant of Andrews Illinois. Other than its loan of credit, the companies, for the purposes of this unfair labor practice, as well as most other purposes, were complete strangers.

*N. L. R. B. v. Condenser Corp.*, 128 F. (2d) 67 (3 Cir., 1942), does not apply here. There the Condenser Corporation did the manufacturing after purchasing the materials at cost from the Cornell corporation. After the product was manufactured it was sold back to Cornell at Condenser's cost. The companies became affiliated and Condenser subsequently became a wholly owned subsidiary of Cornell.

There can be no doubt that the record taken as a whole does not support the finding of the Board that Andrews Oregon and Andrews Illinois are a single employer. The facts do not support such a finding nor does the law as set forth in *Mount Hope Finishing v. N. L. R. B.*, supra.

## II.

## THE PETITION THAT THE MATTER BE REOPENED AND ADDITIONAL EVIDENCE BE ADDUCED SHOULD BE GRANTED.

### Summary of Argument

(1) The financial evidence as to the economic condition of Andrews Illinois is relevant.

(2) The Board is in error that the closing date of the Carterville plant was August 3.

(3) Additional evidence would show more clearly that Andrews Oregon and Andrews Illinois are separate companies.

### Argument

If this Court does not find that Andrews Oregon is not an employer within the meaning of the Act, it should then grant the petition that the matter be reopened and additional evidence be adduced.

This petition for leave to adduce additional evidence will be met and opposed on three grounds. Let us face those grounds candidly and realistically at this time. They are: (1) That Mr. Andrews has had his day in court and there should be an end of litigation; (2) that although Mr. Andrews was a layman he had ample opportunity to employ lawyers to aid him in the hearing; and (3) that the evidence which petitioners now seek to adduce is not newly discovered.

In each case these grounds of opposition are true to a varying degree. But, even with that being true,

petitioners are of the opinion that the record should be reopened and additional evidence adduced.

A reading of the record and especially that portion which sets forth the transcript of Mr. Andrews' testimony (R. 62 to 96) will show that Mr. Andrews was attempting to get before the Trial Examiner the facts and figures and the production of Andrews Illinois so that he could explain why the order to close the Carterville plant of Andrews Illinois was given. If the order were given for economic consideration, that is because the plant was losing money, and not to avoid the duty to bargain collectively with one's employees, then in that case the action of Andrews Illinois would not be an unfair labor practice. As the record now stands, there is ample evidence to support the finding of the Trial Examiner and of the Board that Andrews Illinois committed an unfair labor practice. However, if the record were reopened and testimony were taken which would show the condition of Andrews Illinois, this would have bearing upon whether the order to shut down was in fact an unfair labor practice.

As has been previously stated, the Trial Examiner found that Andrews Illinois committed unfair labor practices by polling its employees (this being done by the committee of businessmen from Carterville) and by locking out the employees on June 1. Certainly the taking of additional evidence bearing upon the economic condition of Andrews Illinois would have no bearing upon the unfair labor prac-

tice which resulted from the activity of the Carterville merchants in their capacity as pseudo agents. But, it would have great probative value as to whether the order of Mr. Andrews in his capacity as president of Andrews Illinois was motivated by a desire to refuse to bargain with the union or by a desire to lessen the losses of Andrews Illinois.

The Board stated that it would not deem such financial evidence of sufficient probative value to justify the shut-down of the Carterville plant of Andrews Illinois for economic reasons (R. 49). Certainly such evidence has a bearing upon the problem and in such a hearing as this all of the facts should come before the Trial Examiner and before the Board as a whole in order that a just result may be had.

Petitioners likewise come before the court requesting that additional evidence be adduced bearing on the length of the period of the shut-down (R. 111). In both the Intermediate Report and Recommended Order of the Trial Examiner and the Decision and Order of the Board, there has been the assumption that the discriminatory lockout and unfair labor practice of Andrews Illinois lasted from June 1 until August 3. Apparently the August 3 date was established by the testimony of Mr. Andrews (R. 72), which reads as follows:

> "Exam. Downing: When did the plant finally close, Mr. Andrews? [109]
>
> "The Witness: Can't give you that.

"Mr. Tuttle: Third of August.

"The Witness: Third of August."

The August 3 date to which Mr. Andrews referred was supplied by Mr. Tuttle, who at that time was not under oath. A reading of the testimony of Mr. Andrews will disclose that the plant was shut down from June 1 on, except for a few days when a small number of employees filled out a government order. The August 3 date was the date when the machinery was dismantled and moved out of the plant.

Additional evidence of a financial nature would bear upon this point and it would be of great importance to petitioners because it would tend to dispel from the mind of the Board an incorrect assumption that the plant was discriminatorily shut down from June 1 to August 3. In fact, the plant was shut down and never reopened.

To be sure, the Board has handled this matter in a rather cavalier manner by its footnote on page 49 of the Record where it states that any determination as to what might have been done between June 1 and August 3 "may properly be raised in the compliance stage of this proceeding." This footnote by its very nature discloses the misapprehensions under which the Board was laboring. Additional evidence would do much to clear up this point.

The Board has made much of the fact that Andrews Oregon guaranteed that the suppliers of Andrews Illinois would be paid. It has made much of

the way in which these accounts were carried on the books of the Oregon corporation. The supplying of credit by the Oregon corporation to the Illinois corporation is one of the items about which Mr. Andrews endeavored to testify, but, because of the fact that he was a layman, he was unable to get the matter before the Trial Examiner and into the record.

The Trial Examiner, after having had an opportunity to view the witnesses personally, found that Andrews Oregon did not commit an unfair labor practice and should not be held liable to the employees of Andrews Illinois. The Board, on reviewing a confused and cold record, undertook to hold Andrews Oregon liable for the unfair labor practice of the Illinois corporation. There is not enough evidence in the record to support the finding of the Board that Andrews Oregon and Andrews Illinois should be considered a single employer, but if the Court were to so find, the record should be reopened so that additional evidence showing the true nature of the relationship between these two corporations may be adduced.

A reading of the testimony of Mr. Andrews will show that he did not understand the nature of the labor hearing. This Court is now faced with the question as to whether Andrews Oregon and its stockholders should be permanently prejudiced by the fact that Mr. Andrews was unable to understand or cope with the situation which existed at the hearing.

## CONCLUSION

The Trial Examiner found that Andrews Illinois had committed two unfair labor practices: (a) by attempting to influence the workers by the intervention of a committee of businessmen, and (b) by a discriminatory lockout ordered by Mr. Andrews. The Trial Examiner found that Andrews Oregon had nothing to do with the commission of these unfair labor practices and could not be held liable for paying the employees of the Illinois corporation.

The Board, in its Decision and Order, saw fit to overrule the Trial Examiner and to hold Andrews Oregon liable as an employer of the Carterville workers.

There is no evidence in the record to support this finding. There is no evidence that shows that Andrews Oregon had anything to do with the representations of the Carterville businessmen. Nor is there any evidence that shows that Mr. Andrews' order to shut down the plant, which was given on June 1, was given by him in any other capacity than as president of Andrews Illinois.

The Board, in its Decision and Order, has set forth a certain number of grounds upon which it has attempted to justify its finding that Andrews Oregon should be liable. These grounds uniformally are unsupported by the evidence of the record taken as a whole and even if they were supported they are without legal effect. At most they can be called

"window dressing" but unfortunately it is merely dressing without a window. There is no showing of interrelationship between these companies or the fact that one is merely a part and parcel of the other. Therefore, this Court should set aside the final order of the National Labor Relations Board.

Or failing to do that, should permit the record to be reopened and additional evidence adduced.

Respectfully submitted,

Ralph R. Bailey,

Alfred A. Hampson, Jr.,

*Attorneys for Petitioners.*

Thus the evidence shows that the two companies were separate corporate entities, which separately owned and operated plants in widely separate localities, which employed separate sets of production employees, and which kept separate books and records. Though Andrews, individually, owned the controlling stock interest in the Oregon company, he did not do so in Illinois. In the latter corporation, for example, Tuttle, Brown, and Lesher were obviously in position to outvote Andrews in all stockholders' meetings, since together they owned 75 per cent of the corporate stock. Cf. Mt. Hope case, supra, at p. 372. Significant also as indicative of separate entities was the fact that though Lesher resigned as secretary of Oregon on July 26, he did not resign his corresponding position in Illinois. Of further significance, particularly in assessing Oregon's responsibility for commission of the unfair labor practices, is the fact that Tuttle, under whose immediate management the Carterville plant was operated, was neither a stockholder nor an officer of the Oregon company.

The evidence also fails to show that common employment conditions existed in the separate plants which the respective Respondents operated, that their operations were integrated, that they had offices at the same address, or that they maintained a common bank account. Cf. Inter-Ocean Steamship Co., 107 NLRB No. 92. This is not a case of a single,

or integrated, enterprise, parcelled into production and distribution, or into other convenient segments, by the corporate arrangements of the Respondents themselves. Cf. N.L.R.B. vs. Concrete Haulers, Inc., 212 F. 2d 477, 479 (CA 5), decided May 6, 1954. The case is also distinguishable from Somerset Classics, Inc., 90 NLRB 1676, enf'd. 193 F. 2d 613 (CA 2), where the Board found Modern Manufacturing Co. to be a co-employer of Somerset's employees and held it responsible for the unfair labor practices committed at Somerset's plant. The Board and the Court emphasized the ownership, control, and operation of the two companies by the same family and the fact that Somerset depended entirely on Modern for its work.

Though the corporate veil may be lifted and the fiction of separate entities may be disregarded on a sufficient showing, the evidence here is not adequate for that purpose. And, as previously observed, there is no evidence that the Oregon corporation actively concerted or participated with Illinois in the commission of the unfair labor practices. N.L.R.B. vs. Lunder Shoe Corp., 211 F. 2d 284, 289 (CA 1). Section 10 (c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein. Symns Grocery Co. (Supplemental Decision Amended),

109 NLRB No. 58; N.L.R.B. vs. Birdsall-Stockdale Motor Co., 208 F. 2d 234 (CA 10).

It is, therefore, concluded and found that Respondent Oregon did not engage in, or participate with Respondent Illinois in engaging in, the unfair labor practices found above, and that it may not be held responsible for remedying those unfair labor practices.

## APPENDIX B

In determining that the Respondents are separate employers and that therefore Respondent Oregon was not responsible for the unfair labor practices committed at the Carterville plant, the Trial Examiner did not advert to a number of factors of paramount significance. These are: (1) the fact that both Respondents are engaged in manufacturing and selling the same product, and have almost identical names; (2) the fact that A. M. Andrews is the virtual owner of Respondent Oregon, and together with his nephew owns 50 percent of the stock of Respondent Illinois; (3) the fact the officers in both corporations are virtually the same; (4) the fact that the Respondent Oregon lent its credit to Respondent Illinois in the acquisition by the latter of raw materials and machinery—thereby providing the very means whereby the Respondent Illinois could operate; (5) the fact that after the shutdown of the Carterville plant, the raw materials and physical assets of Respondent Illinois were turned over to Respondent Oregon, presumably to be disposed of as the latter might direct; (6) the fact that the labor relations of both corporations were controlled by the same person, the aforementioned A. M. Andrews; and (7) the fact that A. M. Andrews demonstrated his practical control over Respondent Illinois by himself making the vital decision to shut down operations at Carterville. The existence of these factors demonstrates the close integration of the Respond-

ents. They show further, and we so find, that the Respondents constitute a single employer within the meaning of the Act.[6] It follows therefrom, and we also find, that Respondent Illinois is an integral part of a multi-state organization, and that Respondent Oregon is responsible for remedying the unfair labor practices herein found to have been committed.[7]

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[6] Don Juan Co., Inc., 79 NLRB 154, 155 enforced 178 F.2d 625, 627 (C.A. 2); N.L.R.B. vs. Federal Engineering Co., 153 F.2d 233 (C.A. 6); N.L.R.B. vs. Condenser Corp., 128 F.2d 67, 71 (C.A. 3); Somerset Classics, Inc., 90 NLRB 1676, enforced 193 F.2d 613 (C.A. 2); Milco Undergarment Co., Inc., 106 NLRB 767, enforced 212 F.2d 801 (C.A. 3); Wright & McGill Company, 102 NLRB 1035. Cf. N.L.R.B. vs. Stowe Spinning Co., 336 U.S. 226, 227.

[7] In view of our determination that the Respondents constitute a single employer within the meaning of the Act, we do not deem it necessary to consider the Trial Examiner's assumption that the Board may apply one standard in judging corporate-interrelationship for the purpose of asserting jurisdiction and a different one in judging corporate-interrelationship for the purpose of remedying unfair labor practices.

## APPENDIX C

| NAME | A. M. ANDREWS CO. OF OREGON | A. M. ANDREWS OF ILLINOIS, INC. |
|---|---|---|
| Incorporated | Oregon | Illinois |
| Place of Business | Portland | Carterville |
| When Incorporated | 1951 | 1954 |
| A. M. Andrews<br>Position | 345 shares<br>President | 1 share<br>President |
| Marshall<br>Position | 16 shares<br>Vice-president | |
| Tuttle<br>Position | | 1 share<br>Vice-president |
| Brown<br>Position | 1 share<br>Treasurer<br>Secretary after July 26, 1954 | 1 share<br>Treasurer |
| Lesher<br>Position | 1 share<br>Secretary until July 26, 1954, succeeded by Brown | 1 share<br>Secretary |